



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2012-0521; FRL- 9745-4]

**Approval and Promulgation of Air Quality Implementation Plans;
Delaware; Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority
and Tailoring Rule Revision**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC). This revision pertains to EPA's greenhouse gas (GHG) permitting provisions as promulgated on June 3, 2010. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION].

ADDRESSES: Submit your comments, identified by Docket ID Number **EPA-R03-OAR-2012-0521** by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: cox.kathleen@epa.gov
- C. Mail: **EPA-R03-OAR-2012-0521**, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.
- D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only

accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-R03-OAR-2012-0521**. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov

SUPPLEMENTARY INFORMATION: Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA. On October 12, 2011, DNREC submitted a proposed revision to the Delaware SIP. The revision is to 7 DE Admin. Code 1125 – Requirements for Preconstruction Review. The amendments incorporate preconstruction permitting requirements for GHG sources consistent with federal requirements.

I. Background

On October 12, 2011, DNREC submitted a revision to EPA for approval into the Delaware SIP to establish appropriate emission thresholds for determining which new or modified stationary sources are subject to Delaware’s Prevention of Significant Deterioration (PSD) permitting requirements for GHG emissions. Subsequent to that submittal, it was discovered that Delaware’s proposed revision contained an error which would have inadvertently and incorrectly limited the circumstances under which a source could trigger PSD requirements for GHG emissions. Delaware initiated steps to undertake rulemaking action to correct the error, and on August 9, 2012, submitted a formal supplement to the October 12, 2011 SIP submittal. The

supplement contained the corrected text of 7 DE Admin. Code 1125. Final approval of Delaware's October 12, 2011 SIP revision will put in place the GHG emission thresholds for PSD applicability set forth in EPA's "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," (the Tailoring Rule) Final Rule, 75 FR 31514 (June 3, 2010), ensuring that smaller GHG sources emitting less than these thresholds are not subject to permitting requirements¹. Pursuant to section 110 of the CAA, EPA is proposing to approve this revision into the Delaware SIP.

Today's proposed action on the Delaware SIP generally relates to four federal rulemaking actions. The first rulemaking action is EPA's Tailoring Rule. The second rulemaking action is EPA's "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," Proposed Rule (GHG SIP Call), 75 FR 53892 (September 2, 2010). The third rulemaking action is EPA's "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," Proposed Rule, 75 FR 53883 (September 2, 2010) (GHG FIP), which serves as a companion rulemaking action to EPA's proposed GHG SIP Call. The fourth rulemaking action is the "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans" 75 FR

¹ The Tailoring Rule also applies to the title V program, which requires operating permits for existing sources. However, today's action does not affect Delaware's title V program.

82536 (Narrowing Rule) (December 30, 2010). A summary of each of these rulemaking actions is provided below.

In the first rulemaking action, the Tailoring Rule, EPA established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources. In the second rulemaking action, the GHG SIP Call, EPA found that the EPA-approved PSD programs in 13 States (not including Delaware) were substantially inadequate to meet CAA requirements because they did not appear to apply PSD requirements to GHG-emitting sources. For each of these States, EPA proposed to require the State (through a “SIP Call”) to revise its SIP as necessary to correct such inadequacies. EPA proposed an expedited schedule for these States to submit their SIP revision, in light of the fact that as of January 2, 2011, certain GHG-emitting sources were subject to the PSD requirements and may not have been able to obtain a PSD permit in order to construct or modify. In the third rulemaking action, the GHG FIP, EPA issued a FIP to apply in any state that was unable to submit, by its deadline, a SIP revision to ensure that the state had authority to issue PSD permits for GHG-emitting sources. Because Delaware already had authority to regulate GHGs, Delaware is only seeking to revise its SIP to put in place the GHG emission thresholds for PSD applicability set forth in EPA’s Tailoring Rule, thereby ensuring that smaller GHG sources emitting less than these thresholds are not subject to permitting requirements for sources of GHG. In the Narrowing Rule, EPA limited its approval of those states’ programs which had the authority to regulate GHG’s, but lacked a vehicle to limit applicability to the higher thresholds established by the Tailoring Rule.

For a detailed discussion of GHGs and GHG-emitting sources, the CAA PSD program, minimum SIP elements for a PSD program, and EPA's recent actions regarding GHG permitting, the relationship between the proposed Delaware SIP revision and EPA's other national rulemakings, as well as EPA's analysis of Delaware's SIP revision, refer to the Technical Support Document in the docket for this action which can be found at www.regulations.gov (Docket No. **EPA-R03-OAR-2012-0521**).

II. EPA's Analysis of Delaware's SIP Revision

On October 12, 2011, DNREC submitted a proposed revision to Delaware's SIP to EPA for approval. The revision is to 7 DE Admin. Code 1125 – Requirements for Preconstruction Review.

On July 29, 2010, Delaware provided a letter to EPA with confirmation that the state not only had the authority to regulate GHG in its PSD and title V programs, but could also interpret the term “subject to regulation” consistent with the Tailoring Rule. Nevertheless, Delaware undertook rulemaking to explicitly incorporate the Tailoring Rule thresholds into their PSD program. Delaware's October 12, 2011, proposed SIP revision establishes thresholds for determining which stationary sources and modification projects become subject to permitting requirements for GHG emissions under Delaware's PSD program.

The changes to Delaware's PSD program regulations at 7 DE Admin. Code 1125 are substantively the same as the federal provisions amended in EPA's Tailoring Rule. As part of its review of the Delaware submittal, EPA performed a line-by-line review of Delaware's proposed revisions and has preliminarily determined that they are consistent with the Tailoring Rule. The

August 9, 2012 revision that was formally submitted as a supplement to the October 12, 2011 submittal addresses an error in the definition of “Subject to Regulation” at 7 DE Admin. Code 1125, section 1.9 – Definitions. The definition as originally submitted would have inappropriately limited the circumstances under which a facility can trigger PSD review for its GHG emissions. The proposed revision to the definition submitted in the August 9, 2012 supplement appropriately mirrors the federal requirements. These changes to Delaware’s regulations are also consistent with section 110 of the CAA because they are incorporating GHGs for regulation in the Delaware SIP.

III. Proposed Action

Pursuant to section 110 of the CAA, EPA is proposing to approve Delaware’s October 12, 2011, SIP revision (as amended by the August 9, 2012 supplement), relating to PSD requirements for GHG-emitting sources. Specifically, Delaware’s October 12, 2011, proposed SIP revision establishes appropriate emissions thresholds for determining PSD applicability to new and modified GHG-emitting sources in accordance with EPA’s Tailoring Rule. EPA has made the preliminary determination that this SIP revision is approvable because it is in accordance with the CAA and EPA regulations regarding PSD permitting for GHGs. EPA is soliciting public comments on our proposed approval of the revisions to the Delaware SIP. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR

52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves the State's law as meeting federal requirements and does not impose additional requirements beyond those imposed by the State's law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed SIP revision pertaining to greenhouse gas permitting does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: October 10, 2012

W. C. Early, Acting
Regional Administrator,
Region III.

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